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# Unlawful Discrimination or a Necessity for a Fair Trial?: Exclusion of a Law Clerk with a Disability from the Courtroom During Jury Trial of a Personal Injury Case

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# UNLAWFUL DISCRIMINATION OR A NECESSITY FOR A FAIR TRIAL?: EXCLUSION OF A LAW CLERK WITH A DISABILITY FROM THE COURTROOM DURING JURY TRIAL OF A PERSONAL INJURY CASE

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## I. INTRODUCTION

In a personal injury case in a Minnesota trial court in March 2000, the plaintiff's lawyer moved for a mistrial on the basis that the judge's law clerk, a man with severe disabilities, had worked in the courtroom in the presence of the jury.[1] The attorney stated that the jury's comparison

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1. *In re* Charges of Unprofessional Conduct Contained in Panel Case No. 15976,

of the law clerk with his client would diminish his chances of a recovery.[2] The trial judge denied the motion.[3] After the jury found for the defendant on the issue of liability, the judge also denied a motion for a new trial brought, in part, on the same basis.[4] Subsequently, the trial judge reported what he deemed to be plaintiff counsel's unprofessional conduct to the Minnesota Office of Lawyers Professional Responsibility.[5] Ultimately, in *In re Charges of Unprofessional Conduct Contained in Panel Case No. 15976,* the Minnesota Supreme Court upheld a determination by a panel of the Minnesota Lawyers Professional Responsibility Board that the attorney had violated Rule 8.4(d) of the Minnesota Rules of Professional Conduct (engaging in conduct prejudicial to the administration of justice) by bringing the post-trial motion on those grounds.[6]

In 1999, in *In re Charges of Unprofessional Conduct Contained in Panel File 98-26,* the court had held that a prosecutor violated Rule 8.4(d) by bringing a motion to prohibit an African-American public defender from being co-counsel for an African-American man charged with robbery of a Caucasian couple.[7] The *Panel Case No. 15976* court extended this holding—that race can never be used as a basis for limiting an attorney's participation in a court proceeding—to "encompass situations where disability is used to limit a court employee's participation in a court proceeding."[8] The court observed that the Minnesota Human Rights Act ("MHRA")[9] prohibits discrimination in

653 N.W.2d 452, 454 (Minn. 2002) [hereinafter *Panel Case No. 15976*]. In this case, the Director of the Office of Lawyers Professional Responsibility referred the complaint to a District Ethics Committee for investigation. *Id*. at 455. Based upon that investigation, the director issued an admonition based on the conclusion that both the initial and post-trial motions constituted unprofessional conduct in violation of Rule 3.1 (frivolous motions) and Rule 8.4(d) (prejudicial conduct) of the Minnesota Rules of Professional Conduct. *Id. See also* MINN. R. PROF. CONDUCT 3.1, 8.4(d) (2002). The attorney exercised his right to have this decision reviewed by a panel of the Lawyers Professional Responsibility Board. *Panel Case No. 15976,* 653 N.W.2d at 455. After a hearing, that panel amended the admonition by limiting it solely to the post-trial motion. *Id.* Both the trial judge and the attorney sought discretionary review of the determination; the Minnesota Supreme Court granted review and consolidated the two cases. *Id*. at 454.

2. *Panel Case No. 15976,* 653 N.W.2d at 454.
3. *Id.* at 455.
4. *Id*.
5. *Id*.
6. *Id*. at 457.
7. *In re* Charges of Unprofessional Conduct Contained in Panel File 98-26, 597 N.W.2d 563 (Minn. 1999) [hereinafter *Panel File 98-26*].
8. *Panel Case No. 15976,* 653 N.W.2d at 456.
9. MINN. STAT. §§ 363.01-20 (2002).

employment, housing, and other areas on the basis of disability as well as on the basis of race.[10] Because Minnesota treats race-based and disability-based discrimination equally under the MHRA,[11] the court concluded that the determination that the plaintiff's attorney violated Rule 8.4(d) was not "clearly erroneous."[12]

In both this case and the previous case involving race discrimination, the Lawyers Board Panel issued a private admonition.[13] Whether that action is by the director of the Office, by a Lawyers Board Panel when an attorney requests review of that action (as in the present case), or after the director submits the issue to a Lawyers Board Panel for hearing, a private admonition may be issued only if the lawyer's unprofessional conduct is of an "isolated and non-serious nature."[14] In the race discrimination case, the Minnesota Supreme Court reversed the private admonition given by the panel on the basis that race-based misconduct was inherently serious.[15] The court, however, exercised its prerogative to determine what disciplinary action was appropriate. Because the prosecutor demonstrated remorse, lacked malicious intent, and took remedial actions, the court issued a private admonition.[16] In

10. *Panel Case No. 15976,* 653 N.W.2d at 456-57.

11. *See* MINN. STAT. § 363.12 (2002) (stating the policy of the MHRA).

12. *Id*. at 458. The Lawyers Professional Responsibility Board Panel had also found that the post-trial motion violated Minnesota Rules of Professional Conduct 3.1, which prohibits a lawyer from bringing a motion "unless there is a basis for doing so that is not frivolous" or "which includes a good faith argument for an extension, modification or reversal of existing law." *Id*. The supreme court noted that the panel relied on the fact that the attorney failed to support his position with legal authority. *Id.* at 457. (The parties to the disciplinary proceeding, the Panel of the Lawyers Board, the court and the amici in the supreme court, all failed to find any other case involving comparable circumstances, whether involving disciplinary action or not.) The court expressed concern that overzealous application of Rule 3.1 could inhibit attorneys from bringing issues of first impression, but did not reach the issue because of the determination that the attorney's conduct violated Rule 8.4(d). *Id*.

13. *Panel Case No. 15976*, 653 N.W.2d at 455; *Panel File* 98-26, 597 N.W.2d at 567.

14. An admonition may be issued "if the Director concludes that a lawyer's conduct was unprofessional but of an isolated and non-serious nature . . . ." MINN. R. PROF. CONDUCT 8(d)(2) (2002). In this case, the panel issued an Amended Admonition pursuant to this rule provision. After a hearing on disciplinary charges, an admonition may be issued only if the unprofessional conduct is of an "isolated and non-serious nature . . . ." MINN. R. PROF. CONDUCT 9(j)(iii) (2002).

15. *Panel File 98-26*, 597 N.W.2d at 568.

16. *Id.* at 568-69. The court noted "with favor the sincerity of respondent's remorse after she recognized her misconduct." *Id.* at 568. The court stated:

> The record in the present case also indicates that once respondent realized the impropriety of her motion, she took immediate action to mitigate the

*Panel Case No. 15976*, the court reviewed the circumstances of the earlier case and stated that there they had "unequivocally held that race-based misconduct is inherently serious."[17] Nevertheless, when faced with disability-based misconduct the court concluded "that the Panel did not act arbitrarily, capriciously, or unreasonably by finding that respondent's conduct in this particular situation was non-serious."[18] The court based this ruling, at least in part, on the fact the prosecutor in *In re Panel File 98-26* misused the power of the state by interfering with a defendant's right to counsel.[19] By contrast, the court stated, the plaintiff's attorney "did not exercise any authority or control over the disabled clerk."[20] Thus, the court reasoned, "[a]ny discriminatory effect from the motion was indirect . . . ."[21]

Unprofessional conduct by an attorney representing the state is indeed serious. But in both cases, the actual discriminatory effect of preventing a criminal defendant from being represented by the counsel of his choice or by altering the customary practice of assigning a law clerk's responsibilities could only be achieved by asking the court to be the instrument of discrimination. From that perspective, the actions of both attorneys were alike; the court prefaced this explanation of its holding

> consequences of her misconduct . . . . Since the incident, respondent has repeatedly expressed remorse over her actions, has apologized and has vowed that such a lapse of judgment will not happen again, and, to that end, has taken precautions to ensure that her error is not repeated.

*Id.* at 569.

17. *Panel Case No. 15976,* 653 N.W. 2d at 456.

18. *Id.* at 458. The court also held that the conduct was "isolated," for only two arguments were made on the same issue during the same trial and there were no other instances of misconduct. *Id.* at 457. Elsewhere in the decision, but not in the discussion of the appropriate discipline, the court noted that the plaintiff's attorney stated when he made the motion that he brought it with "great reluctance" and "acknowledged that the motion was 'outrageous and distasteful for the [c]ourt.' " *Id.* at 454. The court also noted the attorney's statements and testimony at the hearing:

> Addressing his reasons for bringing the motion for a mistrial respondent stated, "I was thinking of fairness and I was thinking of my client and his wishes with respect to at least raising the issue to the judge." He also asserted that his duty to ensure his client received a fair trial overrode his reluctance to bring the motion. Finally, he stated that he would not have made the objection in a case that did not involve disability issues that might lead to similar comparisons.

*Id*. at 455. The court stated without further comment in the review of the procedural posture of the case that the attorney had sought review of the initial private admonition by the director. *Id.* at 454.

19. *Id.*

20. *Id.*

21. *Id.*

that the misconduct involved was "non-serious" with a longer discussion that focused on a perceived tension between the rights of two persons with disabilities, the injured plaintiff and the law clerk.[22] After acknowledging that the law clerk with a disability had a right to perform his job in the courtroom, the court stated:

> But here we have the perceived rights of two disabled persons potentially in conflict with one another . . . . Respondent's client was concerned that the jury would compare the law clerk's more severe disability with his less severe disability and that comparison would unduly influence the jury to decide against him on his claims and deprive him of a fair trial. Ironically, the concern of respondent's client, as argued by respondent, was not that the law clerk's disability prevented him from capably performing his job, but that the law clerk's demonstrated capability would diminish the client's disability claim. Respondent's motion can be viewed as an inappropriate attempt to address the respective rights of two disabled persons, rather than elevating the rights of one over the rights of another. If respondent was concerned that the jury might make improper comparisons, respondent could have addressed those concerns during voir dire. Nonetheless, when viewed in context, we conclude that the Panel did not act arbitrarily, capriciously or unreasonably by finding that respondent's conduct in this particular situation was non-serious.[23]

There is a vast difference between stating "unequivocally" that race-based misconduct is "inherently serious,"[24] and viewing the motion to bar a law clerk with a disability from the courtroom as "an inappropriate attempt to address the respective rights of two disabled persons, rather than elevating the rights of one over the rights of the other."[25] The court's analysis comes perilously close to asserting that discrimination on the basis of disability is more permissible if done by or on behalf of a person with a disability.[26] The court's statements imply that discrimination on the basis of disability by an officer of the court is less serious than discrimination on the basis of race.[27] The court's statements

22. *Panel Case No*. 15976, 653 N.W.2d at 457-58.
23. *Id*.
24. *Panel File 98-26*, 597 N.W.2d at 567.
25. *Panel Case No. 15976*, 653 N.W.2d at 456.
26. *See id.* at 457-58 (responding to complainant's assertion that a more serious sanction is warranted, the court stated that here the issue involved the perceived rights of two disabled persons potentially in conflict with one another).
27. *See id.* (discussing statutory objections to end race-based discrimination and

also suggest that it was not unreasonable for the attorney to bring the motions that he did, at least the initial motion.[28]

Nevertheless, the court did characterize the motion as "inappropriate."[29] The court's decision assumes, without stating, that it was appropriately denied.[30] What the court does not do is analyze the tension between the "perceived rights of two disabled persons potentially in conflict with one another."[31] That analysis would include a more detailed discussion of the law clerk's employment rights, the plaintiff's right to a fair trial, and the trial court's obligation to ensure a fair trial and yet refrain from discriminating against the law clerk on the basis of disability.

## II. DISCRIMINATION ON THE BASIS OF DISABILITY WITH REGARD TO THE TERMS, CONDITIONS, OR PRIVILEGES OF EMPLOYMENT IS PROHIBITED BY STATE AND FEDERAL LAW

The Minnesota Supreme Court stated that a "disabled court employee has a right to perform his job in the courtroom."[32] Both state and federal law appear to support this unqualified statement.[33] The MHRA states that it is an unfair employment practice to discriminate on the basis of disability "with respect to hiring, tenure, compensation, terms, upgrading, conditions, facilities, or privileges of employment."[34] For a law clerk, the opportunity to work in the courtroom seems to be included within the "terms," "conditions," or "privileges" of employment.[35] The trial judge testified at the disciplinary hearing that his two law clerks divided the responsibility of assisting the judge on cases.[36] In addition to preparing memoranda addressing the issues in a case, the trial judge assigned each of his law clerks to communicate with

respondent's objective in bringing the motion, which is distinguishable from race-based discrimination in *In re Panel File* 98-26).

28. *See id.* at 458 (stating that an discriminatory effect from the motion was indirect).

29. *Id.*

30. *See id*. (noting respondent could have addressed any concerns during voir dire).

31. *Id*. at 457.

32. *Id.*

33. *See* 42 U.S.C. § 12112(a) (2003); MINN. STAT. § 363.03, subd. 1(2)(c) (2002).

34. MINN. STAT. § 363.03, subd. 1(2)(c).

35. *Id.*

36. Complainant's Brief and Appendix, app. at 43, *Panel Case No. 15976*, 653 N.W.2d 452 (Minn. 2002) (Nos. C6-02-139 and C3-02-227) [hereinafter Complainant's Brief]; Record at 14-18, Lawyers Professional Responsibility Board (No. 15976) [hereinafter Record].

the jury panel, to seat jury members for voir dire, to administer oaths, and to be available to the judge to respond to questions of law that arose during a trial.[37] The plaintiff's motion sought an order from the court that would remove the clerk from the courtroom and change the customary practice, the judge's law clerks working in the courtroom during trials, solely because of his disability.[38] Given the broad scope of the unfair discriminatory practices in the statute, the reasonable conclusion seems that the law clerk would suffer discrimination actionable under the MHRA if the court were to grant the motion.[39]

The same result would appear to follow from the Americans with Disabilities Act ("ADA"). Title I of the ADA proscribes discrimination on the basis of disability in employment by specified classes of employers, which include states.[40] The statute covers a similarly broad range of employment actions by requiring that "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."[41] The statute defines "discriminate" in broad terms to include "limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee."[42] The basic rule in subsection (a) is as broad as the Minnesota statute. The gloss on "discriminate" in subsection (b) is even broader. A law clerk banished from the courtroom because of his disability is limited in his work and segregated. Subsection (b) also states that the term "discriminate" in subsection (a) "includes" the three specified actions.[43] This language in the ADA[44] appears to establish

37. Complainant's Brief, *supra* note 36, at app. 41, 43-44.
38. *See id.* at 41-44.
39. *See* MINN. STAT. § 363.03 (2002).
40. 42 U.S.C. § 12111(2), (5), and (7) (2003).
41. 42 U.S.C. § 12112(a) (2003).
42. 42 U.S.C. § 12112(b)(1).
43. *Id*.
44. The United States Supreme Court has held that Congress did not validly abrogate the states' Eleventh Amendment immunity for purposes of damages actions based on Title I of the ADA. Bd. of Trustees v. Garrett, 531 U.S. 356, 374 n.9 (2001). However, Title I of the ADA is applicable in this case, which involves the potential discriminatory effect of an order of a state court judge. The Supreme Court noted that "Title I of the ADA still prescribes standards applicable to the States" and that actions against public officials for prospective injunctive relief were still available. *Id.* The Court specifically stated:

what the *Panel 15976* court stated, that the law clerk had a right to perform his job in the courtroom.[45]

Another federal statute, section 504 of the Rehabilitation Act, outlaws discrimination on the basis of a person's disability in programs that receive federal financial assistance.[46]

> No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.[47]

Section 504 would apply to the court's action if the court system receives federal financial assistance.[48] Assuming this federal financial assistance, a directive that a law clerk with a disability be excluded from the courtroom because of that disability would certainly appear to subject that law clerk to discrimination in terms of section 504.[49]

The law clerk's employment rights are also protected by Title II of the ADA, which proscribes discrimination on the basis of disability in public services by stating "no qualified individual with a disability shall,

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> Our holding here that Congress did not validly abrogate the States' sovereign immunity from suit by private individuals for money damages under Title I does not mean that persons with disabilities have no federal recourse against discrimination. Title I of the ADA still prescribes standards applicable to the States. Those standards can be enforced by the United States in actions for money damages, as well as by private individuals in actions for injunctive relief under *Ex parte Young*, 209 U.S. 123 (1908). In addition, state laws protecting the rights of persons with disabilities in employment and other aspects of life provide independent avenues of redress.

*Id.* at 374 n.9. Based upon this footnote in the *Garrett* decision, the Eighth Circuit Court of Appeals, in *Gibson v. Arkansas Department of Correction*, 265 F.3d 718, 719-20 (2001), held that state officials can be sued in their official capacity for injunctive relief under Title I of the ADA by using *Ex parte Young*.

45. *Panel Case No. 15976,* 653 N.W.2d at 457.

46. 29 U.S.C. § 794(a) (2003).

47. 29 U.S.C. § 794(a).

48. *See id.* Unlike the ADA, an action effectively against the state under section 504 is not barred by the Eleventh Amendment. *See* Jim C. v. United States, 235 F.3d 1079, 1082 (8th Cir. 2000) (holding that statutory abrogation of states' Eleventh Amendment immunity from suit under Rehabilitation Act, where the state received federal funds, was a proper exercise of Congress' spending power). Congress enacted section 504 under the Spending Power Clause of the Constitution. *Id.* The state, by accepting the federal largesse, waived its Eleventh Amendment immunity. *Id.*

49. 29 U.S.C. § 794(a) (2003).

by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."[50] The Title II regulations prohibit discrimination by public entities in employment but incorporate the Title I standards.[51] The analysis of the law clerk's employment rights would be the same. Title II cases also involve physical access to a courthouse or a courtroom.[52] While serving as a law clerk in the state district court, the law clerk in this case had physical access to the courthouse and the courtroom.[53]

Of course, to prevail in any claim of discrimination the law clerk would have to establish that he is a "qualified individual with a disability."[54] It is undisputed that the law clerk had a severe disability[55]

50. 42 U.S.C. § 12132 (2003).

51. 28 C.F.R. § 35.140 (2002), provides:

> (a) No qualified individual with a disability shall, on the basis of disability, be subjected to discrimination in employment under any service, program, or activity conducted by a public entity.
>
> (b)(1) For purposes of this part, the requirements of title I of the Act, as established by the regulations of the Equal Employment Opportunity Commission in 29 CFR part 1630, apply to employment in any service, program, or activity conducted by a public entity if that public entity is also subject to the jurisdiction of title I. (2) For the purposes of this part, the requirements of section 504 of the Rehabilitation Act of 1973, as established by the regulations of the Department of Justice in 28 CFR part 41, as those requirements pertain to employment, apply to employment in any service, program, or activity conducted by a public entity if that public entity is not also subject to the jurisdiction of title I.

*But see* Filush v. Town of Weston, 266 F. Supp. 2d 322, 330-31 (D. Conn. 2003) (deeming 28 C.F.R. § 35.140 invalid because Congress did not intend for Title II to apply to employment).

52. Shotz v. Cates, 256 F.3d 1077 (11th Cir. 2001); Keith v. Mullins, 162 F.3d 539 (8th Cir. 1998); Layton v. Elder, 143 F.3d 469 (8th Cir. 1998). The question whether Congress lawfully abrogated the states' Eleventh Amendment immunity in Title II cases is currently before the Supreme Court. Tennessee v. Lane, 315 F.3d 680 (6th Cir. 2003), *cert. granted,* 123 S. Ct. 2622 (2003).

53. He did not, however, have ready access to the supreme court chambers in the State Capitol to attend the argument in *Panel Case No. 15976.* His attendant had to retrieve portable ramps from his van in order to get up the two marble steps that blocked his way. (Personal knowledge of the author.)

54. 42 U.S.C. § 12112(a) (2003).

55. *Panel Case No. 15976,* 653 N.W.2d at 454. The court described him in these terms, "The clerk assigned by complainant to assist in this case is physically disabled. He is paralyzed from his mouth down and has difficulty breathing and speaking. He performed his duties as a law clerk with the assistance of a large wheelchair, respirator and full-time attendant." *Id.*

and was, therefore, a "qualified individual with a disability."[56] The trial judge testified that the law clerk was extremely capable.[57] The court noted that the basis for the plaintiff's motion was that "the law clerk's demonstrated capability would diminish the client's disability claim."[58]

The case for stating that an order barring the law clerk with a disability from the courtroom violates all of these statutes seems clear. That order would directly affect a qualified individual with a disability in the performance of the usual functions of his job solely because of that person's disability. If a law clerk in this situation were actually to sue, however, there is a serious question whether the courts would find that an order excluding the law clerk would violate these statutes.

### *A. Would an Order Prohibiting a Law Clerk with a Disability from Working in the Courtroom Be an Adverse Employment Action?*

The courts are often reluctant to find that actions by employers short of termination or reduction of pay or benefits fulfill the "adverse employment action" component of a prima facie case of employment discrimination, despite the broad language in both the MHRA[59] and the ADA[60] regarding terms, conditions, and privileges of employment.[61] The Eighth Circuit Court of Appeals limits these terms severely in actions under both the ADA and Title VII.[62] The general standard is that

56. The ADA defines a "qualified individual with a disability" as:

> [A]n individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

42 U.S.C. § 12111(8) (2003).

57. Complainant's Brief, *supra* note 36, at app. 42; Record, *supra* note 36, at 17.

58. *Panel Case No. 15976*, 653 N.W.2d at 458.

59. MINN. STAT. § 363.03, subd. 1(2)(c) (2002).

60. 42 U.S.C. § 12112(a) (2003).

61. Cooney v. Union Pac. R.R. Co., 258 F.3d 731, 734 (8th Cir. 2001) ("To establish a prima facie treatment case . . . appellants had to show that they suffered an adverse employment action."); Spears v. Mo. Dep't of Corr. & Human Res., 210 F.3d 850, 853-54 (8th Cir. 2000).

62. *See, e.g.,* Burchett v. Target Corp., 340 F.3d 510, 518 (8th Cir. 2003) (holding that failure to transfer disabled employee to a different department was not in violation of MHRA or ADA); Moisant v. Air Midwest, Inc., 291 F.3d 1028, 1031 (8th Cir. 2002); Manning v. Metro. Life Ins. Co., 127 F.3d 686, 692 (8th Cir. 1997).

the plaintiff must show a "tangible change in duties or working conditions that constituted a material employment disadvantage."[63] Phrased differently, there must not simply be a change in the terms or conditions of employment, but a material change.[64] In rather cavalier fashion, the courts state that "[n]ot everything that makes an employee unhappy is an actionable adverse employment action."[65] Rather, "[t]ermination, reduction in pay or benefits, and changes in employment that significantly affect an employee's future career prospects meet this standard."[66] Adverse employment evaluations that have no direct impact on employment status are not actionable.[67] Mere "inconvenience" is not enough.[68] Lateral transfers that do not involve loss of pay, benefits, rank, or responsibility are not adverse employment actions.[69] The Eighth Circuit has held that employer actions requiring an employee to move from Omaha to Denison, Iowa,[70] or from St. Paul to Chicago[71] are not adverse employment actions in retaliation cases.[72] In *Ledergerber v.*

63. *Burchett,* 340 F.3d at 518 (quoting *Moisant*, 291 F.3d at 1031); s*ee also Spears*, 210 F.3d at 854 (finding that the lowering of an officer's performance evaluation was not an "adverse employment action").

64. Jones v. Reliant Energy—ARKLA, 336 F.3d 689, 691 (8th Cir. 2003) (race discrimination under Title VII); Fenney v. Dakota, Minn. & R.R. Co*.,* 327 F.3d 707, 716-17 (8th Cir. 2003) (ADA and MHRA); Brown v. Lester E. Cox Med. Ctrs*.,* 286 F.3d 1040, 1045 (8th Cir. 2002) (ADA).

65. LaCroix v. Sears, Roebuck, & Co*.,* 240 F.3d 688, 691 (8th Cir. 2001) (sex discrimination and retaliation under Title VII); *see also Brown*, 286 F.3d at 1045.

66. *Jones,* 336 F.3d at 691 (quoting *Spears*, 210 F.3d at 853).

67. *Burchett*, 340 F.3d at 518-19; *see also LaCroix*, 240 F.3d at 691-92 (finding moderately negative performance review to be insufficiently adverse).

68. *Spears,* 210 F.3d at 853 (retaliation under Title VII); *accord* Enowmbitang v. Seagate Tech., Inc*.,* 148 F.3d 970, 973 (8th Cir. 1998) (race and national origin discrimination under Title VII and MHRA).

69. *Fenney,* 327 F.3d at 717; *Brown*, 286 F.3d at 1045; LePique v. Hove, 217 F.3d 1012, 1013-14 (8th Cir. 2000) (sexual harassment under Title VII).

70. Montandon v. Farmland Indus., Inc*.,* 116 F.3d 355, 359 (8th Cir. 1997).

71. Hoffman v. Rubin, 193 F.3d 959, 964 (8th Cir. 1999). In this Title VII retaliation case, the court stated:

> An adverse action occurs when an employee suffers some personal loss or harm with respect to a term, condition, or privilege of employment. Mr. Hoffman's proposed transfer cannot be said to have caused him personal loss or harm, or disadvantage him in any way cognizable under Title VII. His rank, pay, and other benefits would not be changed. We acknowledge plaintiff's contention that personnel and conditions in the Chicago office would be hostile to him. Such considerations, while hardly negligible on a personal level, are not concrete enough to trigger a Title VII claim.

*Id.*

72. The *Montandon* and *Hoffman* decisions make no distinction between an adverse employment action in cases alleging discrimination and those cases claiming retaliatory

*Stangler*,[73] the Eighth Circuit stated the rationale for these decisions by quoting a decision of the Seventh Circuit: "A transfer involving only minor changes in working conditions and no reduction in pay or benefits will not constitute an adverse employment action, 'otherwise every trivial personnel action that an irritable . . . employee did not like would form the basis of a discrimination suit.' "[74]

There are exceptions, but they involve cases in which rather extraordinary action was taken, albeit short of termination or a reduction in pay. Recently, in an ADA case, the Eighth Circuit noted that the adverse action "need not always involve termination or even a decrease in benefits or pay."[75] In that case, the court held that transfer of a surgical nurse to a clerical position in which she could not exercise her professional skill and worked in a room called the "dummy room" amounted to an adverse employment action.[76] The limited number of Minnesota appellate court decisions on these issues often cite Eighth Circuit decisions, although the application of those standards may be less stringent.[77]

The MHRA, the ADA, and Title VII of the Civil Rights Act[78] all

action.

73. 122 F.3d 1142 (8th Cir. 1997).

74. *Id.* at 1144 (quoting Williams v. Bristol-Meyers Squibb Co., 85 F.3d 270, 274 (7th Cir. 1966)).

75. *Brown,* 286 F.3d at 1045 (citing Phillips v. Collings*,* 256 F.3d 843, 848 (8th Cir. 2001) (an action under 42 U.S.C. § 1983 charging discrimination and harassment on a religious basis)). The court found that a fifty-three-page evaluation complete with corrective action plans and remedial training requirements was, in the context presented, an adverse employment action. *Id.*

76. *Brown*, 286 F.3d at 1045-46.

77. *Dietrich v. Canadian Pacific Ltd.,* 536 N.W.2d 319 (Minn. 1995) is the only reported state appellate decision that addresses what constitutes an adverse employment action for purposes of a claim of discrimination under the Minnesota Human Rights Act. Not surprisingly, the court stated that "[i]t would defy logic to hold that a plaintiff who is unemployed because she is furloughed following a reduction-in-force has not suffered an adverse employment action for purposes of a proceeding under the MHRA." *Id.* at 325. In *Cierzan v. Hamline University*, No. C4-02-706, 2002 WL 31553931, at *2 (Minn. Ct. App. 2002), the court applied the "materially alters the terms or conditions of employment" test in a case that arises under the MHRA. In *Mahazu v. Becklund Home Health Care, Inc.,* No. C8-02-28, 2002 WL 1751280, at * 4-*5 (Minn. Ct. App. 2002), the court applied the "material employment disadvantage" test in a whistleblower action under Minnesota Statutes section 181.932. In another whistleblower action, *Johnson v. Independent School District No. 118,* No. CX-00-1998, 2001 WL 605081, at * 4 (Minn. Ct. App. 2001), the court found that the proposed transfer of a bus aide from one school bus to another was not an adverse employment action. *Id.* (citing Hoffman v. Rubin, 193 F.3d 959, 964 (8th Cir. 1999)).

78. 42 U.S.C. § 2000e-2(a)(1) (2003).

proscribe discrimination in a broad range of employment actions, including discrimination in the terms, conditions, or privileges of employment. Contrary to the decisions cited above, the United States Supreme Court has repeatedly stated that this language in Title VII is not limited to "economic" or "tangible" discrimination, and that it covers more than " 'terms' and 'conditions' in the narrow contractual sense."[79] That Court has stated that Title VII demonstrates the intention of Congress to define discrimination in the broadest possible terms.[80] But these statements were made in cases where the workplace was permeated with pervasive discriminatory intimidation, ridicule, and insult that created an abusive working environment.[81]

The law clerk in this case was not faced with a hostile work environment in these terms. Even if prohibited from being in the courtroom for a trial, he would still be employed, would suffer no diminution of pay or benefits, and would still use his professional skills. From that standpoint, there would be no adverse employment action, although the experience of being in court is, in many respects, one of the important benefits of a law clerk position. Perhaps the case would be different if similar motions were granted in other personal injury cases during the course of the clerk's tenure. Considered alone, however, one order that prohibits a law clerk with a disability from being present in the courtroom during one case, even if explicitly based upon that law clerk's disability, may not constitute an adverse employment action for purposes of a lawsuit based on the MHRA or ADA.

### *B. Would There Be Justification for the Discriminatory Action?*

The ADA provides a defense to employers who use selection criteria that tend to screen out or deny a job or a benefit of a job to a person with a disability—that those criteria are "job-related and consistent with business necessity."[82] Assuming that an order or ruling prohibiting a law clerk with a disability were challenged in an action under the ADA, the defense could be that the very presence of a law clerk with a severe disability in the courtroom would so prejudice the jury that the plaintiff could not get a fair trial. This argument amounts to a claim that, for some personal injury trials, it is a bona fide occupational

79. Faragher v. City of Boca Raton, 524 U.S. 775, 786 (1998).
80. Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 116 (2002).
81. *See, e.g.*, Harris v. Forklift Sys., Inc., 510 U.S. 17, 21-22 (1993).
82. 42 U.S.C. § 12113(a) (2003).

qualification ("BFOQ") that law clerks not have a disability, or at least a visible one. But the validity of this BFOQ can "only be ascertained when it is assessed in relationship to the business of the employer."[83] A primary purpose of the court system is to offer litigants a fair trial. Whether there is a reasonable basis to state that the law clerk's presence actually threatens the plaintiff's right to a fair trial requires more detailed consideration if obviously injured plaintiffs have been excluded from the courtroom.

## III. THE INTERESTS AND RIGHTS OF THE INJURED PLAINTIFF

### *A. The Plaintiff's Interest and Right Is to Have a Fair Trial*

The plaintiff in this case had disabilities that were significant, but less severe than those of the court's law clerk.[84] He questioned whether it was possible to get a fair assessment of his injuries when the jury observed the law clerk working productively in the courtroom.[85] His interest and his right is to a fair trial in which the jury would assess both liability and his damages on the basis of the evidence presented. Unlike the law clerk, his interests and rights at this juncture do not arise under the ADA or the prohibition against discrimination on the basis of disability in the MHRA.[86] His claim is similar to the claim of defendants

83. Torres v. Wis. Dep't of Health & Soc. Servs., 859 F.2d 1523, 1528 (7th Cir. 1988). In *Torres* the court had to determine whether the "business" of a women's maximum security prison was rehabilitation and to decide whether it was permissible to employ only female correctional officers in that facility. *Id*. at 1524.

84. *See Panel Case No. 15976,* 653 N.W.2d 452, 454 (Minn. 2002) (noting plaintiff was able to walk with a cane, whereas the law clerk was paralyzed from the mouth down and used a wheelchair). Plaintiff sustained "serious permanent physical injuries that disabled him when a school bus hit and ran over him with a rear tire while he was riding a bicycle in South Minneapolis. *Id.* The accident crushed his pelvis, and left him in a coma for approximately 1 month. By the time of trial, the [plaintiff] was able to walk with the assistance of a cane." *Id.*

85. *Id.* The plaintiff's employment potential was limited not only by his injuries but also by his employment background and experience:

> Before the accident, the client was employed as a checker and bagger at a grocery store and as a greeter at a restaurant. His employment background consisted of similar unskilled and physical labor positions. At trial, the client asserted that his permanent injuries prevented him from performing physical-labor-type jobs and that he did not qualify educationally or intellectually for other types of employment. Therefore, he sought damages for future loss of wages and future diminished earning capacity.

*Id.*

86. The opinion of the court does not mention that the plaintiff was African-

in personal injury actions who fear that the jury will be unfairly sympathetic at the sight of a severely injured plaintiff. That claim, as will be discussed below, has a due process basis. There are no reported cases in which a litigant seeks to bar a court employee with a disability from the courtroom to ensure a fair trial, but the principles established in the cases in which the defendant seeks to exclude an injured plaintiff from the courtroom provide a framework for discussion of the claim that the law clerk's presence reduced the likelihood that the plaintiff would get a fair trial.

### *B. Basis in Law and Fact to Exclude Injured Plaintiffs from the Courtroom During a Jury Trial*

Some relatively early cases held that an injured plaintiff could not be barred from any portion of a trial. The Eighth Circuit Court of Appeals, in *Chicago Great Western Railway Co. v. Beecher*,[87] held that a plaintiff younger than 3 years old, whose injuries were not described, could not be excluded from the courtroom during the trial. The trial judge stated: "I know of no rule of law which authorizes the court to exclude plaintiff, defendant, or any litigant from the courtroom."[88] The Eighth Circuit acknowledged this lack of authority and summarily dismissed a challenge to that ruling.[89]

Similarly, the Florida Supreme Court rejected the argument that it was an error for a trial judge to permit the plaintiff to be brought into the courtroom on a stretcher in, according to the defendant, a "weak, sickened and stupified [sic] condition and attended by a nurse and a hospital attendant."[90] That court stated:

> We think this point is wholly without merit. One who institutes an action is entitled to be present when it is tried. That, we think, is a right that should not be tempered by the physical condition of the litigant. It would be strange, indeed, to promulgate a rule that a plaintiff's right to appear at his own trial would depend on his personal attractiveness, or that he could be excluded from the courtroom if he happened to be

American. Before the motion for a mistrial was made, the plaintiff expressed to his counsel his concern that the jury and all the court officers were white. Transcript, *Panel Case No. 15976*, 653 N.W.2d 452 (Minn. 2002) (Nos. C6-02-139 and C3-02-227) at 39-41, Complainant's Brief, *supra* note 36, at app. 66-68.

87. 150 F.2d 394 (8th Cir. 1945).

88. *Id.* at 399.

89. *Id.*

90. Fla. Greyhound Lines v. Jones, 60 So. 2d 396, 397 (Fla. 1952).

> unsightly from injuries which he was trying to prove the defendant negligently caused.[91]

The court added that if the use of the stretcher "affected" the trial, the court could act to prevent the jury from being deceived by the "subterfuge."[92] This analysis was approved in a New York decision that reversed a trial court ruling that barred a plaintiff with paraplegia who used a wheelchair from the courtroom while the jury was being selected.[93] The court stated that "a judicial determination that the physical appearance of a party, which he has not affected, may be the basis for precluding such party from any stage of a trial, is fraught with danger in its implications."[94]

A federal district judge in Louisiana denied a motion for a remittitur of a $2 million verdict for an extremely badly burned child who was present in the courtroom.[95] The court stated:

> The defendants suggest that the presence of the child in the courtroom and in the corridors of the courthouse in some way inflamed or prejudiced the jury. This allegation is unfounded; the defendants have not pointed out any wrongful conduct on the part of Helen Britain [the child], her parents, or counsel for plaintiffs. Helen Britain was well behaved and quiet the entire time she was in the courtroom. Accordingly I hold that there was not any bias, prejudice, or any other improper influence which motivated the jury in making its award.[96]

Nothing in these reported decisions suggests that there was or had been a request for a bifurcated trial of liability and damages issues. Where damages, but not liability, are at issue, the courts uniformly allow the plaintiff to be present in the courtroom. The courts follow differing rules when a request is made to exclude an injured plaintiff from the courtroom for the liability phase of a trial.[97]

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91. *Id.*

92. *Id.*

93. Carlisle v. Nassau County, 408 N.Y.S.2d 114, 118 (N.Y. App. Div. 1978), *appeal dismissed*, 45 N.Y.2d 965 (1978).

94. *Id.*

95. Anderson v. Sears, Roebuck & Co., 377 F. Supp. 136, 141 (E.D. La. 1974).

96. *Id.*

97. *Compare* Dickson v. Bober, 269 Minn. 334, 337-38, 130 N.W.2d 526, 530 (1964) (holding that injured plaintiff had no right to be present when liability was litigated because he could not contribute to or understand the proceeding and his rights were protected by his legal guardian and his attorney) *and* Morley v. Super. Ct. of Ariz., 638 P.2d 1331, 1334 (Ariz. 1981) (concluding that the comatose plaintiff was properly precluded from appearing in front of the jury during the liability phase due to his inability to assist in the presentation of his case) *with* Cary v. Oneok, Inc., 940 P.2d 201, 205

In a leading case, the Minnesota Supreme Court ruled that a plaintiff who could neither contribute evidence on the question of fault nor comprehend the proceedings had no right to be in the courtroom when liability was litigated.[98] *Dickson v. Bober* involved a young man injured in a motorcycle accident.[99] He was unable to express himself, helpless, entirely dependent upon others, and wholly unable to comprehend the trial proceedings.[100] The trial judge excluded him from the courtroom after observing that "[h]is eyes seemed to function on detection of an unusual movement," that "[h]ideous and agonizing groans and sounds emanated" from him, and that he would present a "depressing spectacle" before the jury.[101] After a verdict for the defendant, the trial judge ordered a new trial because the plaintiff was precluded from appearing before the jury.[102] The court reversed, stating that "the determination of whether a plaintiff unable by reason of his injuries to contribute to or understand the trial proceedings should be permitted, nevertheless, to attend the trial must rest in the sound discretion of the trial court."[103] The court also suggested that to bifurcate the trial would allow a plaintiff whose appearance is relevant to the issue of damages to be present for that portion of the trial.[104]

The Arizona Supreme Court adopted the *Dickson* analysis in *Morley v. Superior Court of Arizona*,[105] a case involving a comatose plaintiff. The court stated:

> A plaintiff unable to at least communicate with counsel will have no right denied by exclusion from the courtroom during the liability phase of the trial. If in addition the plaintiff's physical condition, allegedly caused by the defendant, is so pitiable that the trial court determines the plaintiff's mere presence would prejudice the jury, then failure to exclude the plaintiff during the liability phase would deny the defendant's right to an unbiased jury when the source of the bias is totally

(Okla. 1997) (holding physical appearance alone does not justify exclusion from the courtroom) *and* Green v. N. Arundel Hosp. Ass'n, 785 A.2d 361, 364 (Md. 2001) (excluding a severely brain damaged plaintiff from the liability phase of the trial because of the prejudicial effect on the jury).

98. *Dickson*, 269 Minn. at 337-38, 130 N.W.2d at 530.
99. *Id.* at 336, 130 N.W.2d at 529.
100. *Id*.
101. *Id.*
102. *Id.*
103. *Id.* at 337, 130 N.W.2d at 530.
104. *Id.* at 337-38, 130 N.W.2d at 530.
105. 638 P.2d 1331 (Ariz. 1981).

irrelevant to the liability issue.[106]

The court added that bifurcation would permit the plaintiff to be present during the damages portion of the trial and thus "prove damages by the most direct evidence available—the plaintiff's own physical condition."[107] The Sixth Circuit reviewed these cases and provided an analytical framework, which has been followed in many subsequent cases, to decide when an injured plaintiff should be excluded from the courtroom.[108] Based on *Carlisle v. Nassau County*,[109] *Florida Greyhound Lines v. Jones*,[110] and *Purvis v. Inter-County Telephone & Telegraph Co.*,[111] the court held that a plaintiff's physical condition alone does not warrant exclusion from the courtroom during any phase of the proceeding.[112] Based on *Dickson*, *Morley*, and the court's conclusion that any exclusion from the trial must be consistent with due process, the court held that "a plaintiff who can comprehend the proceedings and aid counsel may not be excluded from any portion of the proceedings absent disruptive behavior or a knowing and voluntary waiver."[113]

The court held that, while jury sympathy alone would not establish jury prejudice, "there may be occasions when the mere presence of a party would render the jury unable to arrive at an unbiased judgment concerning liability."[114] The court based this holding on the fundamental principle that the court has an obligation to ensure that a case is decided on the evidence presented rather than emotional factors.[115] To resolve that issue, *Helminski* held that there must be a hearing in which the defendant has the burden to establish that the plaintiff's presence would prevent or impair the jury's performance of its fact-finding task.[116] The

106. *Id.* at 1334.

107. *Id.*

108. Helminski v. Ayerst Labs., 766 F.2d 208 (6th Cir. 1985). *Helminski* was a products liability case brought by parents on behalf of their minor son, Hugh, claiming that he was harmed by *in utero* exposure to a surgical anesthetic while his mother worked as a registered nurse anesthetist. Hugh was 17 years old when the case was tried. The case was bifurcated late in the proceedings when plaintiff's counsel indicated that he was going to call Hugh as a witness. *Id.*

109. 408 N.Y.S.2d 114, 118 (N.Y. App. Div. 1978).

110. 60 So. 2d 396, 397 (Fla. 1952).

111. 203 So. 2d 508 (Fla. Dist. Ct. App. 1967), *cert. denied,* 210 So. 2d 223 (Fla. 1968) (noting that *Greyhound Lines* precludes the exclusion of the plaintiff from courtroom on the basis of physical appearance).

112. *Helminski,* 766 F.2d at 215.

113. *Id.* at 216-17.

114. *Id* at 217.

115. *Id.*

116. *Id.*

court cautioned, again, that physical appearance alone is not the test, rather "the requisite showing of prejudice cannot be satisfied simply by establishing that a plaintiff has a physical or mental injury; the party seeking exclusion must establish that the party's appearance or conduct is likely to prevent the jury from performing its duty."[117] If the court decides that the party's mere presence would be prejudicial, then the court must consider whether "the party can comprehend the proceedings and assist counsel in any meaningful way."[118] If so, regardless of prejudicial impact, the party cannot be involuntarily excluded.[119] The Sixth Circuit held that the district court improperly excluded the 17-year-old plaintiff, whose physical appearance was normal, without observing him, but on the basis of his described condition alone:[120]

> Although testimony indicated that Hugh was not toilet trained, could not speak, comprehend the proceedings, or assist counsel, and sometimes emitted frightening sounds, this description is insufficient to establish that the jury would be prevented from or substantially impaired in performing its duty. The analysis absent in this case would focus on the likelihood of Hugh displaying abnormal behavior and the likelihood of this conduct affecting the jury's ability to decide the case on the facts.[121]

The court does not specify how a display of abnormal behavior would affect the jury's ability to decide the case on the facts.[122]

Several months before *Helminski* was decided, the company that produced a drug that allegedly caused birth defects moved the federal court in the Southern District of Ohio to exclude injured children from the courtroom during the trial of causation issues.[123] The court ordered that "no child under the age of 10 and no child with visible birth defects,

117. *Id.* at 218.

118. *Id.*

119. *Id.*

120. *Id.* The trial was not bifurcated until after the testimony of the plaintiff's final witness when plaintiff's counsel announced his intention to call Hugh as his witness. *See id.* at 212. His mother and brother had described him in their testimony. *See id.* at 212-13.

121. *Id.* at 218. Although the record did not establish a basis to say that Hugh's presence at trial on the liability issue would be prejudicial, the court held that his absence was not reversible error because Hugh was completely unable to comprehend the proceedings or assist counsel in the case. *See id*.

122. *Id.*

123. *See In re* Richardson-Merril, Inc. "Bendectin" Prods. Liab. Litig., 624 F. Supp. 1212, 1222-24 (S.D. Ohio 1985), *aff'd sub nom. In re* Bendectin Litig., 857 F.2d 290, 322-23 (6th Cir. 1988) (involving a total of 818 cases).

regardless of age" would be permitted in the courtroom.[124] In support of that order, the court stated that the children would not be able to understand the expert testimony, that display of the children's birth defects was "irrelevant to the issue of causation," and that large numbers of children in the courtroom "present a serious potential for distraction and disruption."[125] A separate courtroom was to be set aside in which children and adults (presumably their parents) could watch proceedings on closed-circuit television.[126] After a verdict for the defendant on liability, the court applied the *Helminski* analysis in denying a motion for a new trial.[127] With regard to the first issue—whether prejudice was established—the court stated:

> It is clear that the presence at trial during the liability phase of children suffering from severe visible birth defects is inherently prejudicial. There is no more protected and beloved member of human society than a helpless newborn infant. Conversely, it has become fashionable to castigate and punish that depersonalized segment of society identified variously as "big business," "soulless corporations," or "industrial complex." If the battle is emotional alone, between newborn infants and big business, there can be but one winner. Emotional battles, however, should not be staged in the federal courtroom. We deal in liability imposed not by emotion but by law. It is customary, in fact, to instruct juries that "[a]ll persons including corporations are entitled to a fair trial. The law is no respector of persons."[128]

The court concluded that the "unfair prejudicial effect" of the presence of a deformed child in the courtroom on trial of the liability issue was "beyond calculation."[129]

The *Bendectin* case, which involved hundreds of children, was atypical. Most cases involve a single plaintiff, often a child. In these cases, nevertheless, courts often find the requisite prejudice to bar the plaintiff from the courtroom. In a North Dakota case on behalf of a child alleged to have suffered brain injury at birth, the court held that it was not an abuse of discretion for the trial judge to exclude the child from the courtroom during the liability phase of the trial because her "pathetic"

124. *In re Richardson-Merril, Inc.*, 624 F. Supp. at 1271 (Appendix E).
125. *Id*. at 1270.
126. *Id.* at 1271.
127. *Id.* at 1249.
128. *Id.* at 1224 (quoting Appendix D at 1266).
129. *Id.*

appearance would be a "distraction."[130] In a similar case in Oregon, the trial court refused to allow the jury to view the plaintiff child for a brief period during the liability phase of the trial because the child could not meaningfully participate in the trial and the sole reason would be to prejudice the jury.[131] No formal hearing was held, but the Oregon Supreme Court stated that detailed testimony about the child's condition, including the fact that he experienced eight to twelve seizures a day, and the allegations in the complaint that he had mental retardation and spastic quadriplegia provided ample basis for the trial court to determine that his presence in the courtroom might have caused the jury to decide liability on an improper, emotional basis.[132] The 20-year-old plaintiff in *Green v. North Arundel Hospital Ass'n, Inc.*,[133] who had been severely brain-damaged almost a decade earlier,[134] was excluded from the liability phase of the trial.[135] The trial judge watched a videotape of the young man's day, which showed that he was virtually motionless except for some eye blinking and some movement during suctioning or changing his feeding tube.[136] The trial judge recognized that this man could not be excluded from the courtroom solely on the basis of his physical appearance, but found that the burden to justify his exclusion from the liability phase of the trial had been met and that the prejudice from his presence would extend beyond "any instructions that could be offered."[137]

The cases just discussed strongly suggest that prejudice was actually presumed from the physical appearance of the plaintiffs.[138] They also strongly suggest that the paramount concern was whether the plaintiffs could understand the proceedings and provide any assistance to their counsel.[139] If they could not, then the burden of showing prejudice was relatively slight.

130. Reems v. St. Joseph's Hosp. & Health Ctr., 536 N.W.2d 666, 668-69 (N.D. 1995).
131. Bremner v. Charles, 821 P.2d 1080, 1084, 1086 (Or. 1991).
132. *Id.* at 1086.
133. 785 A.2d 361 (Md. 2001).
134. *Id*. at 364-65.
135. *Id*. at 378.
136. *Id*. at 381.
137. *Id.* at 371.
138. *See* Green v. N. Arundel Hosp. Ass'n, Inc., 785 A.2d 361, 363. (Md. 2001); Reems v. St. Joseph's Hosp. and Health Ctr., 536 N.W.2d 666, 669 (N.D. 1995); Bremner v. Charles, 821 P.2d 1080, 1086 (Or. 1991).
139. *See Green*, 785 A.2d at 363; *Reems*, 536 N.W.2d at 669; *Bremner*, 821 P.2d at 1086.

The Oklahoma Supreme Court adheres more closely to the principles that physical appearance alone cannot justify exclusion from the courtroom and that the possibility of juror sympathy alone is not jury prejudice.[140] The Oklahoma case involved a boy, 6 years old at the time of trial, who was severely burned when he was 3 years old.[141] The trial judge bifurcated the trial, and stated unequivocally that the child would be excluded from the courtroom "because he's scarred so badly I think it would be unfairly prejudicial."[142] The Oklahoma Supreme Court disagreed. That court referred both to Article 2, Section 6 of the Oklahoma Constitution, which states that the "courts of justice of the State shall be open to every person," and to the due process basis for the *Helminski* decision.[143] Although the court found no absolute right for a party to be present in the courtroom, the court held that "[a] party's physical appearance cannot be the sole basis for exclusion from the courtroom, and does not amount to an 'extreme circumstance' permitting exclusion."[144] The court also concluded that a child his age would likely have "some understanding of the basic events of the trial as they occur, and there is nothing in the record to the contrary."[145] This court clearly rejected the assumption that jury sympathy is the equivalent of prejudice: "Rather than assuming the jury will be prejudiced by a physically scarred plaintiff, this holding aligns us with those courts which repose trust in the jury."[146]

Indiana likewise now requires either waiver or a showing of "extraordinary circumstances" to justify exclusion of a party from the courtroom, including the liability phase of a trial.[147] The *Jordan* court based this holding on the state constitutional right to a jury trial in civil cases.[148] The court held that the *Helminski* test announced in *Gage v. Bozarth*[149] was not sufficient to overcome the plaintiff's right to attend

140. Cary v. Oneok, Inc., 940 P.2d 201, 204 (Okla. 1997).

141. *Id*. at 202.

142. *Id.*

143. *Id*. at 203 (citing Helminski v. Alyerst Labs., 766 F.2d 208 (6th Cir. 1985)).

144. *Id*. at 204.

145. *Id.* at 205.

146. *Id.* Four members of the court dissented. Justice Opala stated, citing the *Bendectin* case quoted *supra,* that in "*every* trial in which corporate defendants stand pitted against children, the jury might easily be swayed in favor of an underage person whose countenance is so seriously disfigured." *Id.* at 214 (Opala, J., dissenting).

147. Jordan *ex rel* Jordan v. Deery, 778 N.E.2d 1264, 1272 (Ind. 2002).

148. *Id.* (citing IND. CONST. Art. I, § 20).

149. 505 N.E.2d 64, 69 (Ind. Ct. App. 1987), *overruled by* Jordan *ex rel* Jordan v. Deery, 778 N.E.2d 1264 (Ind. 2002) (finding consistent with *Helminski,* that the plaintiff, who is confined to a wheelchair and dependent upon a ventilator, was unable to

her own trial.[150] The court refused "to articulate a 'bright-line rule' to determine what are 'extraordinary circumstances.' "[151] The dissent observed, "if this case does not present extraordinary circumstances, except for incarcerated litigants it seems that no circumstances could meet this test."[152] According to the court, the record shows:

> Shelamiah suffers from cerebral palsy in all four extremities and Erb's palsy in the left arm, cannot talk, makes involuntary movements and sounds, is sight impaired, and walks with the use of braces and a walker . . . . There is a dispute as to whether Shelamiah can understand the proceedings and communicate with counsel with the use of a laptop computer.[153]

This plaintiff, 11 years old at the time of the trial, appears to be quite similar to the plaintiffs in other cases discussed above. The difference, according to the court, is that she would be denied what the court found to be a "basic and fundamental" right to be present throughout the trial.[154]

These plaintiff exclusion cases establish at least three principles relevant to the case of a law clerk with a disability. The first principle is that the burden is on the party claiming prejudice to establish the bases for excluding a person with a disability from the courtroom.[155] The second principle is that the plaintiff is entitled to be present if there is a constitutional right to do so.[156] There may be disagreement whether there is an applicable constitutional right. There appears to be no disagreement that if there is such a right, that right prevails even if the plaintiff's presence might have a substantial impact on a liability issue for which the plaintiff's physical condition or appearance is irrelevant.[157]

The third principle relates to the second principle. *Dickson, Morley,*

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understand the proceedings and to assist counsel).

150. *Jordan*, 778 N.E.2d at 1266.

151. *Id.* at 1272 n.8.

152. *Id*. at 1272 (Boehm, J., dissenting).

153. *Id.* at 1266 n.3.

154. *Id*. at 1272.

155. Helminski v. Alyerst Labs., 766 F.2d 208, 217 (6th Cir. 1985) (holding that a plaintiff who could assist counsel had a due process right to be present during the liability phase of a trial).

156. *Id*. at 218; Cary v. Oneok, 940 P.2d 201, 213-13 (Okla. 1997) (holding based on both an Oklahoma state constitutional right and on due process); *see also Jordan,* 778 N.E.2d at 1272 (clearly finding that the state constitutional right to a jury trial tips the balance in favor of the plaintiff's presence in court).

157. *See, e.g.*, *Jordan,* 778 N.E.2d at 1276 (finding the constitutional right to be present overcomes potential prejudice).

*Helminski,* and all of the subsequent cases agree that a plaintiff who can assist counsel is entitled to be in court throughout the liability phase of a trial even if the plaintiff's appearance would otherwise be deemed unfairly prejudicial. [158] In short, if the plaintiff has some purpose or function to fulfill during the trial, the plaintiff cannot be excluded.[159] Ironically, if the law clerk in this case were the plaintiff in a personal injury action, this principle establishes that he would be entitled to remain in the courtroom throughout the trial.

## IV. THE OBLIGATION OF THE TRIAL JUDGE TO PROTECT THE INTERESTS OF BOTH THE LAW CLERK WITH A DISABILITY AND THE INJURED PLAINTIFF

The trial judge, faced with a motion to exclude his law clerk from the courtroom because of that law clerk's disability, has obligations that parallel the rights and interests of both the law clerk and the plaintiff. The very purpose of a trial is to ensure that both parties receive a fair hearing. The rules governing civil litigation state at the outset that the purpose is to ensure a fair process that leads to a just determination.[160] One essential component of a fair trial is "a jury capable and willing to decide the case solely on the evidence before it."[161] The court must protect that interest of both parties.

The court also has an obligation to protect the interest of the law clerk that he is not discriminated against on the basis of disability. That obligation arises, in part, from the very basic standards in the Code of Judicial Conduct that a judge must "respect and comply with the law" and "be faithful to the law . . . ."[162] This obligation should apply to actions that regard court employees as well as to litigants before the court. The public as a whole, as well as the law clerk with a disability,

158. Allen P. Grunes, *Exclusion of Plaintiffs from the Courtroom in Personal Injury Actions: A Matter of Discretion or Constitutional Right?* 38 CASE W. RES. L. REV. 387, 397 (1998). Grunes identified several functions the plaintiff could serve during the trial including an educative role (informing counsel of salient facts or issues), a strategic role (discussing tactics with counsel), and what he termed a moral role (deterring untruthful testimony by the opposing party). *Id.*

159. *Id*.

160. MINN. R. CIV. P. 1 ("These rules . . . shall be construed and administered to secure the just, speedy, and inexpensive determination of every action."); MINN. R. EVID. 102 ("These rules shall be construed to secure fairness in administration . . . to the end that the truth may be ascertained and proceedings justly determined.").

161. McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548, 554, (1984) (quoting Smith v. Phillips, 455 U.S. 209, 217 (1982)).

162. MINN. CODE OF JUD. CONDUCT, Canons 2A and 3A(2) (2002).

can reasonably expect that judges will comply with state and federal laws that prohibit discrimination on all the bases specified in those statutes.

Beyond an obligation to comply with the law in general, however, both the Code of Judicial Conduct and the Minnesota Rules of Practice prohibit discriminatory actions by trial judges. Canon 3A(5) requires a judge to "perform judicial duties without bias or prejudice."[163] That Canon states:

> A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, and shall not permit court personnel and others subject to the judge's direction and control to do so. [164]

A judge who may not permit his law clerk to exhibit bias or prejudice should not discriminate against that law clerk on the basis of disability. Canon 3A(6) addresses the issue in terms applicable to the motion for a mistrial, but begs the answer to the question:

> A judge shall require lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, in relation to parties, witnesses, counsel or others. This Section 3A(6) does not preclude legitimate advocacy when race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, or other similar factors, are issues in the proceeding.[165]

The Minnesota General Rules of Practice for the district courts include similar requirements for both the court and counsel. Rule 2.02(a) includes this requirement, "[t]he judge shall at all times treat all lawyers, jury members, and witnesses fairly and shall not discriminate on the basis of race, color, creed, religion, national origin, sex, marital status, sexual preference, status with regard to public assistance, disability, or age.[166] Rule 2.03(d) includes a similar standard of conduct for attorneys.[167]

163. *Id.* at Canon 3A(5).
164. *Id.*
165. *Id.* at Canon 3A(6).
166. MINN. GEN. R. PRAC. 2.02(a).
167. MINN. GEN. R. PRAC. 2.03(d). The rule reads:

> Lawyers shall treat all parties, participants, other lawyers, and court personnel fairly and shall not discriminate on the basis of race, color, creed,

The court's obligation in this apparent conflict of interest between the plaintiff and the law clerk is to be "faithful to the law."[168] Both the law clerk and the injured plaintiff ordinarily have a right to be in the courtroom, the plaintiff to attend the trial of his case and the law clerk to do his job. The cases discussed above state that an injured plaintiff should not be excluded from the liability portion of a trial on the basis of appearance alone. Similarly, the law clerk should not be excluded from the courtroom on the basis of his evident disabilities unless there is some additional basis to establish prejudice to the plaintiff.

The cases discussed above require that a defendant who seeks to bar a plaintiff from the liability phase of a trial has the burden of showing that it would be unfair or prejudicial to allow the injured plaintiff in the courtroom. How prejudice is established is not clearly explained. Two suggested bases for establishing prejudice are that the plaintiffs will distract the jury either by their appearance or by their behavior,[169] or that the plaintiff's appearance will prompt an emotional response by the jury rather than a rational consideration of the evidence.[170] In this case, even if some members of the jury feel sympathetic to the law clerk, there is no reason that this sympathy would prejudice the jury against the plaintiff to the extent that observation of children with birth defects might prejudice a drug company. It is speculative to suggest that jurors will grant less damages to an injured plaintiff because there is somebody with manifest disabilities working in the courtroom. Indeed, the speculation could run

religion, national origin, sex, marital status, sexual preference, status with regard to public assistance, disability or age.

*Id*.

168. MINN. CODE OF JUD. CONDUCT, Canon 3A(2) (2002).

169. Morley v. Super. Ct. of Ariz., 638 P. 2d 1331,1334 (Ariz. 1981) (stating that even during the damages phase of the trial the plaintiff might be kept out of the courtroom if his "presence becomes disruptive to the conduct of the trial"); Green v. N. Arundel Hosp. Ass'n, Inc., 785 A.2d 361, 370 n.4. (Md. 2001) (noting that the trial court might have been concerned with "the disruptive effect of suctioning his air tube—the noise and jerking movement that the court observed on the video").

170. *In re* Richardson-Merrell, Inc., "Bendectin" Prods. Liab. Litig., 624 F. Supp. 1212, 1222-23 (S.D. Ohio 1985) ("Trial attorneys do not seek an impartial jury. They seek a sympathetic jury."); Bremner v. Charles, 821 P.2d 1080, 1086 (Or. 1991) ("[Plaintiff's] presence in the courtroom during the liability phase of the bifurcated trial may have caused the jury to decide the question of liability on an improper basis, *i.e.* an emotional one."); *Morley,* 638 P.2d at 1333 ("[H]is presence would only prejudice the jury by evoking sympathy for him."); Caputo v. Joseph J. Sarcona Trucking Co., Inc., 611 N.Y.S.2d 655, 655 (N.Y. App. Div. 1994) ("[plaintiff's] presence in the courtroom would have impaired the jury's ability to objectively perform its task because he physically appeared to be in a state of unawareness").

the other way.

Even if there were some rational basis for the claim that the jury members will be swayed to the detriment of the plaintiff's damages award by the law clerk's presence, the cases discussed above hold that the injured plaintiff may not be excluded from the courtroom so long as he or she serves some purpose in the courtroom, including the ability to confer with counsel. The law clerk, who serves several functions in the courtroom, should likewise not be excluded. The law clerk also has a right under state and federal law to work in a courtroom setting if qualified to do so. Just as the injured plaintiff's due process rights (or state constitutional rights) should not be abridged because the jury might be swayed by the plaintiff's appearance, the law clerk's rights under the MHRA and the ADA should not be abridged on the speculative basis that the jury will disobey instructions to decide the case, including damages, upon the basis of the evidence presented.

The employment discrimination cases discussed above indicate that an isolated instance in which a law clerk is prevented from working in the courtroom because of that law clerk's disability may not constitute an actionable adverse employment action under either the MHRA or the ADA. If such a case were presented, hopefully the courts would not characterize a deliberately discriminatory action taken in a court of law as a "mere inconvenience" or dismiss that action as another example of a personnel action that makes an irritable employee unhappy. The issue is not whether the employer was evenhanded in allocating computers.[171] The mistrial motion in this case sought deliberate discrimination by the presiding officer in a court of law. If in fact it was the intent of Congress to define discrimination in the broadest possible terms, and the language of both Title VII and the ADA does that, then an order or ruling that excludes a court employee from the courtroom simply because that employee had an evident disability should be an actionable adverse employment action.

Whether or not the law clerk has a viable action under the ADA or the MHRA, that order or ruling would be inconsistent with the Code of Judicial Conduct and, in Minnesota, the Rules of Practice in the district courts.[172] Those standards reflect what the courts ought to be—places where discrimination against members of protected classes does not occur. That point was made in two decisions of the United States

171. *See* Enowmbitang v. Seagate Tech., Inc., 148 F.3d 970, 973 (8th Cir. 1998).
172. CODE OF JUD. CONDUCT 2A and 3A(2); MINN. GEN. R. PRAC. 202(a) and 203(d).

Supreme Court in cases involving the use of peremptory challenges.[173]

In *Edmondson v. Leesville Concrete Co*., the Court held that private litigants may not use peremptory challenges to exclude jurors on the basis of race.[174] The Court concluded that use of peremptory challenges on the basis of race could require potential jurors "to be put at risk of open and public discrimination as a condition of their participation in the justice system."[175] Justice Kennedy added:

> Finally, we note that the injury caused by the discrimination is made more severe because the government permits it to occur within the courthouse itself. Few places are a more real expression of the constitutional authority of the government than a courtroom, where the law itself unfolds. Within the courtroom, the government invokes its laws to determine the rights of those who stand before it. In full view of the public, litigants press their cases, witnesses give testimony, juries render verdicts, and judges act with the utmost care to ensure that justice is done.[176]

Three years later the Court held that intentional discrimination on the basis of gender in the use of peremptory strikes also violated the Equal Protection Clause.[177] Once again the Court noted the impact of this action on the integrity of the judicial system:

> Equal opportunity to participate in the fair administration of justice is fundamental to our democratic system. It not only furthers the goals of the jury system. It reaffirms the promise of equality under the law—that all citizens, regardless of race, ethnicity, or gender, have the chance to take part directly in our democracy. When persons are excluded from participation in our democratic processes solely because of race or gender, this promise of equality dims, and the integrity of our judicial system is jeopardized.[178]

Although the Court made no reference to disability in this statement,[179]

173. Edmondson v. Leesville Concrete Co., 500 U.S. 614, 628-30 (1991); J.E.B. v. Alabama *ex rel* T.B., 511 U.S. 127, 145-48 (1994).

174. *Edmondson*, 500 U.S. at 618-19.

175. *Id.* at 628.

176. *Id.*

177. *J.E.B.*, 511 U.S. at 130-31.

178. *Id.* at 145-46 (footnote omitted) (citation omitted).

179. It is highly improbable that the Court will extend these rulings to exclude peremptory strikes based on disability. At an early point in the opinion, the Court stated that litigants may "exercise their peremptory challenges to remove from the venire any group or class of individuals normally subject to 'rational basis' review." *Id*. at 143. The Court cited *Cleburne v. Cleburne Living Center,* 473 U.S. 432, 439 (1985), which held

there is no reason to say that discrimination on the basis of disability is ever acceptable in our courts.

The Minnesota Supreme Court was right. The court employee with a disability did have a right to perform his job in the courtroom and the motion for a mistrial based on his presence was indeed inappropriate.[180] The court was also right to state that "[n]either race nor disability should be used as a means of limiting participation in our courts."[181] The court failed, however, to characterize discrimination on the basis of disability as "inherently serious." The court could have stated forcefully, but did not, that when discrimination on the basis of disability occurs within the courtroom, the promise of equality dims within the courtroom and, in the instance of this case, in the legal profession.

## V. CONCLUSION

In 1993, in *Panel File 98-26*, the Minnesota Supreme Court noted that its *Task Force on Racial Bias in the Judicial System* recognized that the justice system found itself "used as a powerful tool of the pervasive prejudice and the subtle, often elaborately camouflaged discrimination that still deeply scars our national life."[182] In 2003, a decade after that task force report, the number of African-American partners at the largest law firms in Minneapolis and St. Paul could "be counted on two hands, a situation almost unchanged from a decade ago."[183] The legal profession has had and still has an "inherently serious" problem in the employment of African-Americans.[184]

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that a rational basis test, not a strict scrutiny test, applies to determine whether a particular action that affects a person because that person has a disability violates the Equal Protection Clause. There is no reasonable likelihood that this ruling will be changed. In any event, in many cases potential jurors with disabilities might be excluded for cause.

180. *See* Panel Case No. 15976*,* 653 N.W.2d 452 (Minn. 2002).

181. *Id.* at 456.

182. *Panel File 98-26*, 597 N.W.2d 563, 567 (Minn. 1999) (quoting MINNESOTA SUPREME COURT, TASK FORCE ON RACIAL BIAS IN THE JUDICIAL SYSTEM, FINAL REPORT 5 (1993)).

183. Deborah Caulfield, *Limited Partnerships*, STAR TRIB. (Minneapolis), Feb. 9, 2003, at D1.

184. This article cannot encompass a complete discussion of all issues relating to discrimination in the legal profession. Gender discrimination continues as well. While women associates are being hired at roughly the same rate as men, the great majority of partners in private firms are male and male attorneys are more highly compensated than women. WOMEN IN THE LEGAL PROFESSION COMMITTEE, MINNESOTA STATE BAR ASSOCIATION, SELF-AUDIT FOR GENDER EQUITY (SAGE): SURVEY OF PRIVATE LAW FIRMS 1995-2000, at Conclusion (Oct. 22, 2002).

The legal profession has had and still has a serious problem in hiring and employment of persons with disabilities. In 1999, the Disability Subcommittee of the Hennepin County Bar Association Diversity Committee issued a *Report and Model Guidelines for the Integration of Attorneys and Law Students with Disabilities into the Legal Profession.* The subcommittee concluded "that people with disabilities have been discriminatorily excluded from full participation in the legal profession."[185] The subcommittee based this conclusion in part on nationwide surveys that consistently showed "that attorneys with disabilities, despite their qualifications, are greatly disadvantaged in the job market, and that their starting salaries are lower than those of their non-disabled colleagues statewide."[186] The subcommittee also quoted local attorneys who reported discrimination in hiring.[187] One respondent to a survey conducted by the subcommittee stated: "Once my disability was revealed, the tone of the interview changed dramatically from friendly to suspicious of me."[188]

Nationwide survey data confirm the experience of attorneys with disabilities in Hennepin County and throughout Minnesota. The National Association for Law Placement surveys law graduates and reports on their employment status and salaries. These surveys establish that only a small number of law graduates report they have a disability.[189] From 2000 to 2002, the percentage of law graduates with a disability employed in full-time legal work, or work for which bar passage was required, has ranged from 13% to 18% lower than the percentage for all law graduates.[190] For all types of work, the percentage of graduates who have a disability who are employed has been 8% less than the percentage of all graduates.[191] Median starting salaries reported by law graduates

185. DIVERSITY COMMITTEE DISABILITY SUBCOMMITTEE, HENNEPIN COUNTY BAR ASSOCIATION, REPORT AND MODEL GUIDELINES FOR THE INTEGRATION OF ATTORNEYS AND LAW STUDENTS WITH DISABILITIES INTO THE LEGAL PROFESSION 2 (May 1999) [hereinafter REPORT AND GUIDELINES].

186. *Id.* at 4.

187. *Id.*

188. *Id.*

189. For the classes of 2000, 2001, and 2002, "employment status" was reported as of mid-February of the following year for 427, 387, and 411 law graduates with a disability, respectively, out of a total of more than 30,000 graduates. NALP, *Jobs & J.D.'s, Employment and Salaries of New Law Graduates, Class of 2000*, at 45; NALP, *Jobs & J.D.'s, Employment and Salaries of New Law Graduates, Class of 2001*, at 45; NALP, Jobs & J.D.'s, *Employment and Salaries of New Law Graduates, Class of 2002*, at 47.

190. *Id.*

191. *Id.*

with a disability remained static at $46,000 to $47,000 from 2000 to 2002, while median salaries for all graduates increased from $51,900 to $60,000 during that period.[192]

Discrimination on the basis of disability in our judicial system has not received the scrutiny given to discrimination, also very real, on the basis of race and gender. Despite the evident disparity between the rate of employment and compensation of lawyers with disabilities and lawyers who do not have disabilities, studies and reports on diversity in the legal profession frequently do not focus on or even address employment of lawyers with a disability.[193] The National Association for Law Placement ("NALP") and the American Bar Association ("ABA") recently undertook "a comprehensive study of judicial clerkships as employment opportunities for law graduates."[194] NALP and the ABA were motivated by "several critical concerns about clerkships and diversity in the legal profession."[195] Nevertheless, the word "disability" occurs only once in the "Executive Summary and Action Plan," in a statement that had nothing to do with students with disabilities but rather discussed reasons students gave, or not, for seeking a clerkship with a particular judge.[196] As might be expected in a report motivated in part by concerns about diversity among law clerks, the judiciary portion of the Action Plan included a recommendation that the courts seek to employ a diverse group of law clerks.[197] The report states, "[t]he judiciary is encouraged to join many other organizations who have embraced the goal of diversity in background, experience, race, ethnicity,

192. *Id.* The number of law graduates with a disability reporting salary information was small: only 213 for the class of 2000, 191 for the class of 2001, and 183 for the class of 2002. NALP, *Class of 2000*, at 18, 60; NALP, *Class of 2001*, at 18, 58; NALP, *Class of 2002*, at 18, 60.

193. The Hennepin County Bar Association's report is an exception, as is the report from the San Francisco Bar Association on which it builds. *See* REPORT AND GUIDELINES, *supra* note 185, at 2 (focusing on integrating attorneys and law students with disabilities into the legal profession); BASF, *Guidelines for Accommodation of Lawyers and Law Students with Disabilities, available at* http://www.sfbar.org/about/diversity.html (last visited Nov. 25, 2003) (also on file with the author). That organization also produced videotape, *Breaking Down Barriers: Overcoming Discrimination Against Lawyers with Disabilities*. *Id*.

194. NALP, *Courting Clerkships: The NALP Judicial Clerkship Study, Introduction and Rationale, at* http://www.nalp.org/nalpresearch/clrksumm.htm (last visited Nov. 25, 2003).

195. *Id.*

196. *Id.* at Findings from the Law Students Study. The report states: "Considerably de-emphasized by the students were factors such as a personal connection to the judge and the race/ethnicity, gender, sexual orientation or disability status of the judge." *Id*.

197. *Id.* at Action Plan to Address These Concerns: I. The Judiciary.

gender, sexual orientation, and age for the legal profession by setting a similar goal for their clerkship ranks."[198] Perhaps it was merely an oversight that "disability" was not included in this recommendation. Perhaps it was not, for the data collected as part of this study do not include references to whether law clerks have a disability. Table 1 provides "Demographic Characteristics" for the years 1994-98.[199] There are data on Native Americans, Asian/Pacific Islanders, African-Americans, Hispanics, Caucasians, and women, but no data on persons with disabilities.[200] The other tables address race, ethnicity, and gender distribution, but not issues relating to disability.[201]

In *Panel Case No. 15976,* the Minnesota Supreme Court did not ignore the mandate of state and federal law that discrimination on the basis of disability can no longer be tolerated in our society, in the legal system, and in the legal profession. Rather, the court found that conduct involving discrimination on the basis of disability, when it involved a potential conflict of the "perceived rights" of two persons with disabilities, was less serious than the "inherently serious" discrimination on the basis of race.[202] The rights in question are, as discussed above, significantly different. The right to a fair trial is shared by all litigants, whether persons with disabilities or not. The right not to be discriminated against on the basis of disability arises out of the status of being a person with a disability and is unique to that group of persons.

In commentary on this case and the aftermath of it, the chair of the Minnesota Lawyers Professional Responsibility Board made these statements:

> Some experienced trial lawyers have argued that the conduct in question should never have been a disciplinary matter in the first place, citing the lawyer's critical role as an advocate for his client's interests. There is certainly a strong intuitive sense, especially among trial lawyers, that a lawyer should never be subject to discipline for making an argument that he or she reasonably believes to be in the client's interests.[203]

There is, not only among persons with disabilities, a strong intuitive

198. *Id.*

199. NALP, *Courting Clerkships: The NALP Judicial Clerkship Study, Table 1. Law School Classes 1994-1998—Demographic Characteristics* (on file with the author).

200. *Id.*

201. *Id.*

202. *Panel Case No. 15976,* 653 N.W.2d 452, 458 (Minn. 2002).

203. Charles E. Lundberg, *Making Private Discipline a Public Matter*, BENCH & BAR OF MINN. 12, 13 (Feb. 2003).

sense that few lawyers would have considered making a comparable motion based on the race or sex of a courtroom employee. The peremptory strike cases stress that discrimination on the basis of race and gender in jury selection harms the judicial system. Why should discrimination on the basis of disability in the courtroom be any different? The plaintiff exclusion cases discussed above provide part of the reason. The plaintiffs are viewed, by both counsel and the courts, as objects that present an injury or a disability.[204] Their right to be present or not is considered, at least in part, under the Rules of Evidence.[205] In the present case, the motion to have the law clerk barred from the courtroom treated him as an object potentially in evidence. Plaintiffs bring their "object status" to an action, but law clerks do not.

Today, the judicial system, broadly viewed to include bench and bar, jurors, and court personnel, includes more persons of color and more women than ever before. Issues of discrimination on the basis of race and gender continue, but progress has been made. However, few persons with evident disabilities practice law or sit on the bench. Perhaps that is why the very presence of a man with serious disabilities prompts concerns about the effect that he will have, just being there, on the outcome of a case. When more persons with evident disabilities, more persons who use wheelchairs or have personal care attendants or make

204. *See, e.g.,* Green v. N. Arundel Hosp. Ass'n, Inc., 785 A.2d 361, 370 n.4 (Md. 2001) ("If, as we are now told, the intent was to have him brought in on one day for less than an hour, the implication is even stronger that his presence would simply be as an exhibit, not to implement his constitutional, statutory, or common law right to be present."). In a prosecution for criminal vehicular operation resulting in injury ("great bodily harm"), the trial court allowed the severely injured victim, a young child, to be present in the courtroom at the time a physician testified about his injuries. The Minnesota Court of Appeals found no basis for reversal of the conviction:

> At trial, all relevant evidence is admissible. If, however, the potential for prejudice substantially outweighs the probative value of a piece of evidence, the trial court may exclude it. [The defendant] argues that the trial court erred in allowing [the victim] to be present in the courtroom.
>
> Although [the victim's] appearance may have been shocking, it was not so prejudicial as to forbid [his] presence. In addition, we note that [the victim] was not admitted into evidence nor, as appellant admits in his brief, was [he] used for any demonstrative purpose.

State v. VanWert, 438 N.W.2d 416, 423 (Minn. Ct. App. 1989), *rev'd on other grounds,* 442 N.W.2d 795 (Minn. 1989) (citations omitted).

205. *See In re* Richardson-Merrell, Inc., "Bendectin" Prods. Liab. Litig., 624 F. Supp. 1212, 1224 (S.D. Ohio 1985); Reems v. St. Joseph's Hosp. and Health Ctr., 536 N.W.2d 666, 668-69 (N.D. 1995) (stating that the trial court excluded a disabled plaintiff from the courtroom under the North Dakota Rules of Evidence 403 because the "pathetic" appearance of the plaintiff would be a "distraction").

notes in braille, are present in courthouses, practice law, or decide cases, these concerns regarding the impact of a particular courtroom employee should be alleviated. If more persons with disabilities were seen practicing law or deciding cases, it is also probable that more consideration would be given by the courts and by attorneys to the effect that misguided advocacy may have on persons with disabilities.